

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MICHAEL GARDNER

Plaintiff,

- against -

MARTIN R. WADE III,

Defendants.
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Declaration of
Brian Gardner, Esq.

Case No.: 08-cv-2850

Brian Gardner declares as follows:

1. I am an attorney representing Plaintiff Michael Gardner, ("Gardner") in the above captioned matter. As such, I have personal knowledge of the facts contained in this declaration.

2. In connection with the instant matter, Plaintiff, presently, intends to present six witnesses at the trial of this matter. Those witnesses include Michael Gardner, Martin R. Wade, III, Mr. Vincent Orza, Mr. Paul Goodman, Mr. Richard Berman, and Mr. Bruce Galloway. All of these witnesses will testify on the issues of who, or whom, was responsible for developing and recommending the business model utilized by Broadcaster, Inc. The Plaintiff does not anticipate the need for any additional witnesses at this time.

3. While present at the Baytree offices on March 5, 2008, our office confirmed with Wade and his counsel that a lawsuit asserting claims for defamation had been filed in New York County Supreme Court. Wade stated that he was well aware of the lawsuit. He was informed that we would be serving a copy of that complaint.

4. It was my understanding that Wade had previously agreed to accept service of the summons and complaint when he appeared at the Baytree offices. The summons and complaint were then served upon Wade on March 5, 2008 at Baytree's offices (the same office he had used three days a week for business). Immediately upon completion of service, counsel for Wade, Mr. Zweig, indicated his displeasure to me concerning this service stating he was unaware such service would occur.

5. Despite the fact that service had been completed, I personally offered to Zweig, in the presence of Wade, to withdraw the service and to serve Wade at a later date. I then again reiterated to Zweig and Wade that if service was a problem, then Wade should give me back the summons and complaint, and our office would service it otherwise. Zweig and Wade, after discussing this matter in the hallway of the Baytree offices in my presence, expressly stated to me that such other service was not necessary and that Wade would accept the personal service made upon him. He then left still holding the summons and complaint.

6. The issue was never raised again until the instant papers.

7. It should further be noted that no trick occurred. It is my understanding that it was Wade, along with Mr. Nolan Quan, who suggested that they come to Baytree's offices to discuss the settlement of the Baytree action. Only the pleading in the instant matter was served upon Wade.¹

8. In connection with Plaintiff's opposition to Defendant's instant motion, I respectfully submit the below listed exhibits. The following exhibits are true copies of

¹ The Baytree action refers to the matter of Baytree Capital Associates, Inc. v. Quan, Case No. 08-CV-1602, a derivative action currently pending in Federal District Court for the Central District of California.

documents obtained from the public records, obtained or created by me, or my office, obtained from independent sources or received during the course of this matter:

- Exhibit A: Relevant portions of Broadcaster SEC Form 10-KSB, October 15, 2007
- Exhibit B: Relevant portions of the transcript of the deposition of Martin R. Wade, III taken in the matter of Baytree Capital Associates, LLC et al. v. Quan, et al. on April 22, 2008
- Exhibit C: Summons and Complaint in the matter of Michael Gardner v. Martin R. Wade, III, Case No. 08-cv-2850
- Exhibit D: Declaration of Mr. Vincent Orza in the matter of Baytree Capital Associates, Inc. et al. v. Quan, et al.
- Exhibit E: Declaration of Mr. Paul Goodman in the matter of Baytree Capital Associates, Inc. et al. v. Quan, et al.
- Exhibit F: Declaration of Mr. Michael Gardner in the matter of Baytree Capital Associates, Inc. et al. v. Quan, et al.

WHEREFORE, as detailed in the accompanying Memorandum of Law, which is incorporated by reference herein, it is respectfully requested that this Court deny the Defendant's motion to dismiss, or in the alternative, transfer venue.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
June 5, 2008

Respectfully submitted,



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